As Commissioner Quello correctly observed, "Congress has targeted foreign ownership as a subject for legislation." Separate Statement of Commissioner James H. Quello, February 7, 1995, at 1 (Quello Statement). Indeed, both chambers are presently considering measures that would either reduce or eliminate the foreign ownership restrictions currently contained in 47 U.S.C. § 310(b).

On March 30, 1995, the Senate Commerce Committee reported out S. 652, a comprehensive telecommunications reform bill. S. 652 would amend Section 310(b) by creating an exception to the foreign ownership restrictions where the FCC determines that the country under whose laws a foreign corporation "is organized" — not, as under the Commission's proposal with respect to Section 214 and Section 310(b) determinations, the country that is the foreign carrier's "primary market" — "provides equivalent market opportunities" to U.S. entities. S. 652, § 105(a). See also S. Rep. No. 23, 104th Cong., 1st Sess. 33 (Mar. 30, 1995) (noting that bill would allow FCC to "look beyond where the corporation is organized" under certain circumstances). The bill does not define "equivalent market opportunities," a term that may or may not coincide with the "effective market access" test suggested in this proceeding. The bill also would direct the Commission to assess the equivalency of market opportunities "on a market segment specific basis." S. 652, § 105(a). Compare NPRM ¶ 45 (proposing to consider as a factor in public interest calculus the general state of liberalization in the foreign carrier's domestic market and the availability of other market access opportunities to U.S. carriers). In addition, S. 652 contains a "snapback" provision for "reciprocity failure." S. 652, § 105(a). S. 652 is a clear expression of Congress's intent to loosen the foreign ownership restrictions of Section 310(b). See S. Rep. No. 23, at 33 ("Foreign countries point to section 310(b) as a reason to deny U.S. companies entry into their markets.").

In the House, by contrast, Representatives Oxley, Boucher, Fields, Tauzin, and Hastert have introduced a bill (H.R. 514) that does more than merely scale back the foreign ownership restrictions of Section 310(b). H.R. 514 would repeal Section 310(b), thus eliminating all restrictions on the foreign ownership of common carrier and other radio licenses (and eradicating any basis for the Commission's rulemaking with respect to Section 310(b)). H.R. 514, § 1 (introduced Jan. 13, 1995). The bill has been referred to the House Commerce Committee, which held hearings on the measure on March 3, 1995.

In view of Congress's active consideration of various amendments to Section 310, this is not an opportune time for the Commission to launch an inquiry into whether to add an "effective market access" test to its public interest determinations under Section 310(b)(4). As Commissioner Quello cogently explained, "the Legislative Branch of our Federal Government, rather than this Commission, properly should take the lead in any reconsideration of Section 310." Quello Statement at 1; see also ibid. ("I believe that is our role to seek and accept guidance from Congress; particularly when a subject is under active consideration in the Legislative Branch of our Federal Government.").

In addition to the deference owed to Congress by the Commission, there are other compelling reasons to hold this proceeding in abeyance pending the outcome of congressional activity. Most obviously, Congress's action might well render completely unnecessary the Commission's inquiry with respect to Section 310 (as, for example, if H.R. 514 is enacted). Alternatively, if S. 652 is enacted, it would grant the Commission power to consider equivalency of market opportunities in making public interest determinations under Section 310(b) (a power that the Commission now lacks, see pp. 8-22, supra). Congressional action might also have an important bearing on the issues raised in this proceeding. To the extent that Congress enacts into law a different approach to reciprocity from that proposed in this proceeding, the

Commission would need to examine the differences. And, of course, it is possible that congressional action will result in other changes to Section 310 that are not now foreseeable. In view of these uncertainties, the Commission should not now consider the issue of "effective market access" under Section 310.

Indeed, DT submits that these considerations strongly counsel in favor of postponement of this entire proceeding (not simply the part of it relating to Section 310) pending Congress's likely action. It is possible that changes to Section 310 will have an effect on questions relating to Section 214. For example, if Congress were to repeal Section 310 or expressly to forbid consideration of "effective market access", this would certainly raise additional doubts about the Commission's already questionable authority to require "effective market access" under Section 214 (see pp. 4-8, supra). Alternatively, Congress might take up the subject of whether the Commission does (or should) possess the authority either to pursue open foreign markets as an independent goal or to impose requirements on foreign countries that are, in effect, in the nature of trade barriers. DT submits that in light of the present uncertainty, the Commission should await congressional action before proceeding with this regulatory initiative.

B. Market Access Issues Are Currently Being Considered In Multilateral Trade Negotiations

Under the auspices of the World Trade Organization (WTO), the United States is currently engaged in multilateral trade negotiations in an effort to reach consensus on the terms of a General Agreement on Trade in Services (GATS). An important part of this negotiation is trade in the telecommunications sector. Some twenty WTO members are actively involved in these negotiations, with another thirty or so countries participating as observers. According to Larry Irving, the United States' "key objective" in these negotiations "is to persuade our trading partners to open their basic telecommunications markets to competition."[26]

The pendency of this rulemaking could well have an adverse effect on the outcome of GATS. This is so for the same reasons that retaliation by other countries would probably result from imposition of the proposed "effective market access" test (see pp. 33-36, supra). The Commission's proposed approach, after all, creates an additional hurdle for foreign carriers desiring to serve the U.S. international market. In addition, some countries might perceive the Commission's actions as an effort to gain for the United States additional leverage in the GATS negotiations. This would violate the standstill agreement to which the United States is a party, which in turn could create a backlash that would harm U.S. interests. The Commission should not interject itself into these delicate matters of State.

C. Competition Is Rapidly Developing In The EU And Germany

A final reason to postpone action is the rapid progress toward greater competition now unfolding in the EU and its largest telecommunications market, Germany. The Commission's proposal risks derailing or at least delaying those encouraging developments.

In the past six years, the EU has issued a series of important directives aimed at bringing greater competition to the telecommunications sector. The EU mandated full competition in all telecommunications sectors by January 1, 1998, and the European Commission is in the process of issuing implementing guidelines and directives. Liberalization in the EU has acquired a momentum of its own.

[26] Testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Dept. of Commerce, before the Committee on Commerce, Science and Transportation of the Senate, at 5 (Mar. 2, 1995).

Competition is also rapidly developing in Germany. Germany already has liberalized many telecommunications services, such as private line, facsimile, data, managed network, and value-added services; customer premises and other telecommunications equipment; and satellite, very small aperture terminal (VSAT), PCS, cellular, and other mobile services. Consistent with the EU's timetable, Germany will open the markets that remain restricted — network infrastructure and public switched voice service — on January 1, 1998. Germany, moreover, has just announced an aggressive schedule to assure a fast start for competition once these markets are opened, as well as an ambitious and pro-competitive blueprint for the future regulatory regime. See Key Elements of the Future Regulatory Framework in the German Telecommunications Sector (Mar. 27, 1995).

Several characteristics enhance Germany's ability to carry out its commitment to bring full competition to the country's telecommunications markets. Germany is subject to EU directives (which Germany and DT support) requiring full competition in 1998. In addition, unlike their U.S. counterparts, German states do not regulate telecommunications. This has the effect of streamlining and simplifying regulation at the national level. DT and the government agree that competition should be introduced, although we may not agree on every detail of implementation.[27]

The openness of the German market is confirmed by the activities of major U.S. companies. Pier Carlo Falotti, president of AT&T Europe, best summarized AT&T's attitude

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[27] Germany in the end may achieve full competition more quickly than the United States. Germany first introduced competition in 1989. In nine short years, between 1989 and January 1, 1998, Germany will have moved from full de jure monopoly to no legal barriers to competition. This time period compares favorably with efforts of U.S. authorities, who began in the 1950's and 1960's to break up the AT&T monopoly. And the U.S. effort is far from complete, as is demonstrated by the fierce lobbying battles in the U.S. Congress over telecommunications reform and the resistance to competition by some state utility commissions.

toward Germany by stating recently: "We will invest a lot, more than we have done, especially in Germany. If one country has understood what competition brings it is Germany, which will lead Europe."[28] According to Falotti, the focus of the AT&T group's investment initially will be in Germany, Britain, and possibly some Eastern European countries. AT&T does not make this claim lightly, as it intends to be the second largest operator in every telecommunications market in Europe that it chooses to enter. Ibid.[29]

Germany has no barriers to foreign entry into its telecommunications markets that are liberalized. As a result, U.S. companies have made sizable investments in German operations. For example, in the German cellular market, DT competes with Mannesman Mobilfunk GmbH, of which foreign companies hold 38 percent, including a 26 percent interest held by AirTouch. Similarly, a German PCS license was awarded to the E-Plus consortium, which has nearly 40 percent foreign ownership, including a 21 percent interest held by BellSouth Corporation. German authorities have granted television licenses to foreign entities, including U.S. companies. These licenses were granted without reference to foreign ownership. In most cases, the foreign

[28] William Boston, Unisource Target Europe for Expansion, Reuter News, March 7, 1995.

[29] AT&T's assessment of Germany mirrors that of other large and sophisticated companies. For example, British Telecom has acquired a 37.5 percent interest in VIAG Interkom, a joint venture with the German company VIAG, which will seek a full license to offer facilities-based, switched voice services. Beginning in April 1995, VIAG Interkom will offer services currently offered by Concert, the BT/MCI partnership. BT's contribution to VIAG Interkom is its largest European investment outside of the United Kingdom. Similarly, Cable & Wireless holds a 45 percent interest in VEBACOM, a joint venture with the German company VEBA, which also will seek a license to provide basic switched voice service in Germany. BellSouth Corporation holds a 40 percent interest in a new joint venture with Thyssen and likewise will seek a full license to provide basic switched voice service.

companies hold direct interests in German radio licenses.[30] German companies currently do not receive reciprocal treatment from the U.S. government in the ownership of radio licenses.

IV. IF THE COMMISSION IMPLEMENTS AN "EFFECTIVE MARKET ACCESS" TEST, THEN "AFFILIATION" SHOULD BE LIMITED TO CONTROLLING INTERESTS

The NPRM requests comment on what level of ownership should give rise to an "affiliation" under Section 214 triggering application of the "effective market access" test, including in situations where "more than one foreign carrier or a foreign carrier consortium has ownership interests in a U.S. carrier." NPRM ¶¶ 52, 57, 61. As previously explained, DT strongly believes that the Commission should continue its current approaches under Sections 214 and 310 and not seek to coerce foreign countries to permit "effective market access" to U.S. carriers. But if the Commission decides to impose such a requirement, then it should at least tailor the definition of "affiliate" to increase the likelihood of effectuating the stated goals of this proceeding. This would best be accomplished by limiting the definition of affiliation to situations where the foreign carrier controls the U.S. affiliate. If the Commission decides (unwisely, in DT's view) to define affiliation more broadly, then it cannot logically exempt non-ownership interests that give rise to equivalent "incentives" to engage in anticompetitive conduct.

A. Only Controlling Ownership Interests Should Give Rise To An Affiliation For Purposes Of Section 214

The NPRM proposes to alter the Commission's current, general approach to determining "affiliation" as prescribed less than three years ago in Regulation of International Common Carrier Services, 7 FCC Rcd 7331 (1992) (International Services). In that proceeding,

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[30] Similarly, 21 of the 49 German satellite licenses were awarded to foreign entities, including 12 to U.S. companies. Unlike the U.S., Germany allows direct access to Intelsat satellites (without requiring an investment in Intelsat) by licensees who have signed appropriate agreements and waivers.

the Commission decided that for purposes of post-entry regulation of U.S. common carriers with foreign affiliations, only those U.S. carriers that control, are controlled by, or are under common control with foreign carriers will be deemed "affiliates" of those foreign carriers and thus subjected to dominant carrier regulation on routes involving those foreign carriers. Id. at 7332-33; see also id. at 7342 n.9 (noting that Commission was not deciding definition of affiliation for purposes of allowing entry).[31] In making control the benchmark of affiliation, the Commission explained that this test encompassed all situations where a foreign carrier "has the ability to discriminate in favor of its U.S. affiliate in the provision of services or facilities used to terminate U.S. international traffic." Id. at 7332 (emphasis added).

In International Services, the Commission also expressly rejected a broader definition that would have included non-controlling ownership (and non-ownership) interests, observing that while such arrangements theoretically might give rise to an incentive to discriminate, such discrimination is "unlikely" to occur in the absence of control. The Commission explained:

> Absent control * * * the foreign carrier would not be in a position to direct the actions of the U.S. carrier, and we think the U.S. carrier would be unlikely to risk sanctions by th[e] Commission for participating in discriminatory conduct that violated Commission rules or policy, or any conditions of its Section 214 certificate. We note that U.S. carriers will be subject to ongoing reporting requirements that are designed to detect discrimination by foreign carriers or administrations in favor of specific U.S. carriers, and we retain the option to impose or reimpose dominant carrier regulation on a particular carrier that is found to have engaged in anticompetitive conduct. DOJ notes as well that it has the authority to take enforcement action under the antitrust laws in appropriate cases.

7 FCC Rcd at 7332-33. In view of these effective safeguards, the Commission concluded that the theoretical "possibility of anticompetitive collusion" does not pose a sufficient "threat to

[31] Although the Commission has distinguished between "affiliation" for purposes of entry and "affiliation" for purposes of post-entry regulation, the Commission has not explained why the definition should be different for the two contexts. Indeed, the NPRM asks for comment on whether the Commission should make the two standards identical in order to achieve "administrative simplicity." NPRM ¶¶ 65-66.

competition" to warrant a standard of affiliation encompassing more than control, "particularly in light of the substantial competitive benefits that can result from lifting the burden of current regulation." Id. at 7333; see also id. at 7331 (stating that Commission's actions will "provide significant consumer benefits" and "continue to protect U.S. carriers from discrimination").

The NPRM proposes to loosen this standard of affiliation for purposes of regulating entry as well as post-entry operations. NPRM ¶¶ 52-66; see also id. at ¶¶ 55, 57. It defends this proposed change not by reference to the stated goals of this proceeding but on the ground that a broader definition is needed in order to guard against anticompetitive risks in the international services market.[32] Yet that is precisely the rationale invoked by the Commission in International Services for adopting a control standard of affiliation. The NPRM does not explain why abandonment of the Commission's previous position is warranted.

The NPRM does suggest, however, that the proper ownership benchmark for affiliation should hinge on "what level of ownership may give the foreign carrier the incentive to discriminate in favor of the U.S. carrier or to engage in other strategic conduct that might have anticompetitive effects." NPRM ¶ 57 (emphasis added). This highly qualified language suggests that the Commission is now seeking to address theoretical risks of anticompetitive conduct that it previously deemed unworthy of regulatory concern. But here again, the NPRM does not explain why the Commission is proposing to chart this new approach.

In DT's view, questions surrounding the appropriate definition of affiliation should be answered by reference to the Commission's stated objectives in this proceeding. The

[32] The NPRM also states that another reason to revise the Commission's affiliation standards is the variety of new ways in which foreign carriers are entering into joint ventures with U.S. carriers (including "co-marketing arrangements such as AT&T's WorldPartners"). NPRM ¶ 53. But the Commission proceeds to exclude "non-equity business arrangements" from its definition of affiliation (NPRM ¶ 62), a move that suggests that this variety of new business arrangements has little or no significance for this rulemaking.

Commission's overarching goal is to "promote effective competition in the global market for communications services." NPRM ¶ 1, 21, 26. Its two subsidiary goals are to prevent anticompetitive conduct in the provision of international services or facilities, and to encourage foreign governments to open their communications markets. NPRM ¶ 26. Retaining the control standard would further, more than any other suggested standard, all three of these goals.

As previously explained, the Commission has already concluded that the control standard for affiliation achieves the goal of "prevent[ing] anticompetitive conduct in the provision of international services or facilities." NPRM ¶ 26 (emphasis added). In contrast, a definition of affiliation that includes non-controlling interests does little or nothing to prevent anticompetitive conduct because, as the Commission explained in International Services, (See 7 FCC Rcd at 7332-33), such arrangements do not give rise to any true ability to act anticompetitively.

Indeed, in the absence of a controlling interest there is very little incentive to engage in anticompetitive conduct. Only where there is control would a foreign carrier be assured that a U.S. affiliate will act in concert. In addition, in the absence of control, there is no guarantee that profits resulting from any anticompetitive conduct would be distributed to the foreign carrier shareholder. And without a "control premium" the foreign carrier has less incentive to take steps to enhance the affiliate's value. On the other hand, the foreign entity (and the U.S. affiliate) would risk substantial sanctions in the United States (as well as in other foreign countries, including Germany) if such conduct were uncovered by regulators. A foreign carrier might be subject to a variety of administrative penalties, and the U.S. affiliate likely would have to defend investigations by the FCC and possibly the U.S. Department of Justice or Federal Trade Commission. Given the effectiveness of the various safeguards the Commission has previously imposed, and the fact that other competitors in the market for global services are sophisticated entities (such as AT&T) that would be vigilant in watching for anticompetitive conduct, the risk of detection and punishment would be overwhelming. In addition, the foreign carrier and U.S. affiliate would face a loss of goodwill and would incur substantial legal costs in defending administrative actions. Only a controlling interest could outweigh these substantial risks associated with anticompetitive conduct.

A concrete example from the DT/FT/Sprint transaction, currently under review by the Commission, is illustrative. In that proceeding, AT&T has alleged that DT would have the incentive to discriminate in favor of Sprint as a consequence of DT's planned 10% interest in Sprint. AT&T hypothesized a five percent shift in return traffic from AT&T to Sprint. Opposition of AT&T Corp., File No. ISP-95-002, at 35. In view of DT's small 10% ownership stake, however, such a shift would reap DT a minuscule profit of only $250,000.[33] (Even a 50 percent interest in Sprint would yield DT just $1.25 million profit in the foregoing example.) Even if no sanctions were levied for such anticompetitive conduct, which would obviously be noticed by AT&T, the loss of goodwill and the cost of defending administrative or legal actions would easily offset the hypothetical profit.

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[33] In 1993, the return traffic to AT&T from Germany was 175,226,021 minutes. (Return traffic and settlement data are from FCC, *1993 Section 43.61 International Telecommunications Data,* which may differ somewhat from traffic subject to proportionate return.) Five percent of this amount is 8,761,301. Such a shift would lower AT&T's return minutes to 166,464,720. In 1993, Sprint received 29,588,826 minutes from Germany. An increase of 8,761,301 minutes therefore would boost Sprint's total minutes from Germany by about 30 percent, an increase that would be easily detectable. The effective settlement rate paid U.S. carriers to terminate traffic from Germany to the U.S. was about 45 cents per minute. (Application to change the rate to about 25 cents is pending before the FCC. A traffic shift after rate reduction would result in an even smaller increase in profits for DT.) An increase in return minutes to Sprint of 8,761,301 minutes would increase Sprint's claim on settlement revenue by about $3,943,000. Assuming that Sprint's cost to terminate the traffic is 15 cents per minute, the traffic shift would increase Sprint's net revenue from terminating traffic by about $2,628,000. Since DT would have a 10 percent interest in Sprint, DT's pro rata share of the net revenue would be $262,800.

As for the primary goal of promoting effective competition in the global services market, the control benchmark ensures that pro-competitive "entry" by new competitors and pro-competitive infusions of foreign capital by foreign carriers (which can be used by U.S. carriers in the expensive process of upgrading infrastructure and making other technological advances) are not unduly constrained. This will minimize the short-term, detrimental effects on competition that the Commission's market access requirement will cause, by permitting infusions of new capital at levels short of obtaining control without fear of FCC disapproval.

Limiting affiliation to instances of control, moreover, could serve the subsidiary goal of encouraging foreign governments to open up their communications markets. As previously explained (see pp. 33-36, supra), the "effective market access" test will spur foreign governments to open markets only if (a) the benefits of such action to the carrier are also felt and valued by the government and (b) those benefits outweigh the political and other costs of declining to take that step. But a foreign government's desire to obtain approval of foreign-carrier investments falling short of control probably will not be sufficiently strong to outweigh the various political and economic reasons that otherwise have led the foreign government to keep its market closed. By excluding non-controlling ownership interests, the Commission's policy would focus on those instances where its policy is most likely to be successful, while exempting situations where the likelihood of success is negligible or nonexistent. This approach also reduces the likelihood of retaliation and the concomitant, counterproductive effect of spurring foreign countries to further close their markets to U.S. carriers.

B. Any Extension Of The Definition Of Affiliation Beyond Controlling Interests Would Be Unwarranted

Even though the control standard could optimally serve the Commission's stated goals in this proceeding, the NPRM proposes to include in the definition of affiliation certain non-controlling ownership interests. It also proposes to exclude non-ownership interests that fall short of control. And the Commission requests comment on how to calculate the minimum threshold of ownership giving rise to affiliation in cases where multiple foreign carriers are involved. Although DT strongly objects to any definition of affiliation extending beyond control, the company wishes to comment on several issues that would arise if the Commission disagrees.

First, the Commission's reliance on various other definitions of affiliation as a basis for an ownership threshold (NPRM ¶¶ 58-60) is misplaced. The vast differences in how affiliation is defined in the sources cited by the Commission show that the term is elastic and is defined according to the purposes at hand. In addition to the instances cited in the NPRM, affiliation is sometimes defined to include only ownership stakes that are very substantial (a majority share) or that amount to control. See, e.g., MFJ § IV(A) (defining "affiliate" of AT&T as "any organization or entity * * * that is under direct or indirect common ownership with or control by AT&T or is owned or controlled by another affiliate"; and defining "own" or "ownership" for purposes of this provision as "a direct or indirect equity interest (or the equivalent thereof) of more than fifty (50) percent of an entity."); 47 C.F.R. § 1.1504(f) (defining affiliation for purposes of eligibility for award of attorneys' fees under Equal Access to Justice Act by reference to whether entity holds "a majority of voting shares"); 47 C.F.R. § 32.9000 (defining affiliation for purposes of Uniform System of Accounts for Telecommunications Companies as control, which in turn is defined as the "power to direct or cause the direction of the managements and policies of a company").[34] The wide array of uses of the concept of affiliation merely shows that such analogies are not helpful.

[34] See also 12 U.S.C. §§ 221a(b), 3106 (affiliates own or control with power to vote 50 percent of subsidiary's stock).

Second, if the Commission does adopt a definition of affiliation that includes non-controlling ownership interests on the ground (rejected in previous Commission decisions) that such arrangements can give rise to substantial "incentives" to engage in anticompetitive conduct, then it makes no sense for the Commission to exclude non-ownership interests falling short of control that present identical risks and incentives. The Commission, however, proposes "not to include in [its] definition of affiliation non-equity business relationships between carriers." NPRM ¶ 62 (emphasis added). "[W]hile such relationships between carriers can also provide them with the incentive to favor one another," the Commission explains, "such incentives are relatively attenuated compared [to] those that are present with ownership interests." Ibid. The Commission adds that "co-marketing arrangements, such as AT&T's WorldPartners Company," would not create an affiliation triggering review, "provided [that] they are, both in theory and in practice, nonexclusive." NPRM ¶63 (footnote omitted). Nonexclusive co-marketing arrangements, however, might be subjected to additional filing as well as reporting requirements. Id. at ¶62. The Commission requests comment on these proposals.

The line between equity and non-equity investments does not have the decisive importance attributed to it by the Commission's proposal (unlike the line between control and non-control). Indeed, the line makes little sense if the Commission's goal is in fact to define affiliation to encompass ventures in which a foreign carrier "may [have] * * * the incentive to discriminate in favor of the U.S. carrier or to engage in other strategic conduct that might have anticompetitive effects." NPRM ¶ 57 (emphasis added). As the NPRM itself acknowledges, non-equity relationships between carriers "can also provide them with the incentive to favor one another." NPRM ¶ 62. See also International Services, 7 FCC Rcd at 7333 ("[C]ertain non-ownership arrangements between a U.S. and foreign carrier, such as co-marketing agreements * * * or joint ventures * * * could provide a financial incentive for carriers to act jointly in pursuit of marketing objectives * * * ."). And while the NPRM singles out co-marketing arrangements such as AT&T's WorldPartners as an example of those non-equity relationships that are excluded from the definition of affiliation, it grounds that exclusion on the alleged fact that WorldPartners is "nonexclusive". NPRM ¶ 63.

Nor is the Commission correct in suggesting that by their very nature, all non-equity arrangements create incentives to engage in anticompetitive conduct that "are relatively attenuated compared [to] those that are present with ownership interests." NPRM ¶ 62. DT submits that the strength of incentives will depend very much on the particulars of specific arrangements. In fact, that was precisely the conclusion of the D.C. Circuit in its recent decision in United States v. Western Electric Co., 12 F.3d 225 (D.C. Cir. 1993) (Royalty/Funding). Royalty/Funding involved the question of whether a non-equity arrangement between a BOC and a second entity — under which the BOC proposed to fund the development of a telecommunications product by the entity and in exchange to receive a "direct and continuing share" in the entity's revenues derived from the product's sales — rendered the entity an "affiliated enterprise" of the BOC within the meaning of the AT&T decree. Id. at 232.[35] Although the D.C. Circuit's decision rested largely on the language, structure, and negotiating history of the decree, the Court also noted that its definition of "affiliated enterprise" furthers the purposes underlying the decree's line-of-business restrictions. "If a [BOC] provided a manufacturer with research and development funds in exchange for a continuing share in the manufacturer's future sales," the court of appeals explained, "it could have a significant incentive to pursue * * * [various anticompetitive] strategies in an attempt to protect its stake and enhance its earnings." Ibid. (emphasis added). Under the D.C. Circuit's reasoning,

[35] The MFJ's line-of-business restrictions forbid BOCs, either "directly or through any affiliated enterprise," to manufacture telecommunications equipment. See 12 F.3d at 227.

AT&T's WorldPartners might well create "significant incentives" to engage in anticompetitive conduct if the arrangement grants to AT&T or to its foreign partners a direct share in the revenues from the sales of products that are jointly developed and sold by the partnership.

We note, moreover, that AT&T would be hard-pressed to deny this point, at least without flatly contradicting the position it urged upon the D.C. Circuit in the Royalty/Funding appeal. There AT&T successfully maintained that the Court should reject the BOCs' argument that affiliation is limited to situations of ownership or control. "[A] construction of the term that turns on such 'formal attributes' as equity ownership," AT&T states, "should be unthinkable in an antitrust decree designed to end incentives to leverage bottleneck facilities into adjacent vertical markets." Br. of Defendant-Appellee American Telephone and Telegraph Co. at 27, United States v. Western Electric Co., No. 92-5079. AT&T also argued that "a funding/division-of-revenue arrangement gives the RBOCs the ability to earn unlimited profits from investments in telecommunications equipment manufacturers or interexchange carriers and creates the same incentives to engage in discrimination and cross-subsidization as would an RBOC's ownership of one of those firms." Ibid. (emphasis added); see also id. at 33 (suggesting that a "direct financial stake" in an entity's success would create "incentives to discriminate in its favor") (emphasis omitted). AT&T should not be heard to take a contradictory position in this proceeding.

Third, the FCC lacks authority under Section 214 to require approval of non-controlling investments. See p. 5 supra. The FCC's Section 214 authority is triggered by construction, extension, acquisition, or operation of a line; transmission over a line; and discontinuance or impairment of service. 47 U.S.C. §214(a). An investor that does not have de jure or de facto control has not acquired the line, nor has it performed any other actions triggering Section 214 authority. Therefore, the FCC lacks authority to require a Section 214 application merely upon a minority investment from another country.

Similarly, when a carrier with a minority investment from another country <u>does</u> propose to acquire or extend a line, an "effective market access" test is not a proper public interest determination for the carrier's Section 214 application. See pp. 6-8 <u>supra</u>. The purpose of Section 214 review is to determine whether operation of the line in question would serve the public interest, not whether a foreign government has open trade and investment policies. The latter inquiry — openness of foreign markets — should be conducted by the Executive Branch, not by the FCC. Congress and the Executive Branch have embarked on multilateral negotiations to resolve telecommunications trade issues. See pp. 15-20 <u>supra</u>. Similarly, Congress delegated to the USTR authority to resolve telecommunications issues through bilateral measures, including reciprocity. See pp. 20-23 <u>supra</u>. Therefore, the FCC lacks authority to consider "effective market access" as part of its Section 214 public interest determination.

<u>Fourth</u>, any affiliation test that the Commission adopts should not aggregate the control or ownership stakes of carriers from different countries. Such an approach would not optimally serve the stated purposes of this rulemaking and the "effective market access" test: to promote effective competition in the global market for communications services, prevent anticompetitive conduct in the provision of international services or facilities, and encourage foreign governments to open their communications markets. NPRM ¶ 26.

Aggregation of shares would not serve to prevent anticompetitive conduct because the greater the number of participants involved in any scheme of anticompetitive conduct, the less likely it is that such scheme will be successful. Indeed, this is a principal rationale behind the requirement of structural separation or use of a separate subsidiary in many telecommunications contexts. As Judge Greene explained in entering the AT&T decree, "[a]nticompetitive activities undertaken by two separate corporations rather than by two components of the same corporation are likely to be far more difficult to accomplish because of increased problems of coordination and the greater possibility of detection." United States v. AT&T, 552 F. Supp. 131, 191 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). This reasoning applies with far greater force, moreover, where the two entities — that would be required to coordinate their discriminatory actions — have separate wireline networks that are subject to oversight by two separate national regulators.

Aggregation of the shares of multiple foreign carriers would not foster the Commission's other goals in this proceeding either. As previously explained, the Commission's "effective market access" approach is unlikely to spur action by a foreign government if there is little to be gained by the carrier serving that country's market. But when a carrier has less than a controlling stake riding on the FCC's determination, its home government would have little reason to open markets it would otherwise keep closed. The incentive is simply too small. Conversely, the harm to competition in the market for global services occasioned by an aggregation approach would be considerable, because it would impede even relatively small infusions of foreign capital included in consortia. In sum, the Commission's goals in this proceeding would best be served by not aggregating the shares of foreign carriers.

CONCLUSION

For the foregoing reasons, DT urges the Commission either to reject the "effective market access" test, or to terminate or postpone this rulemaking proceeding. In the alternative, DT suggests that the Commission adopt a definition of affiliation for purposes of Section 214 that is limited to control.

Respectfully submitted,

Werner J. Hein /gpm

DEUTSCHE TELEKOM AG

Werner J. Hein
Alan E. Untereiner
Julian P. Gehman

MAYER, BROWN & PLATT
2000 Pennsylvania Ave.
Washington, D.C. 20006

Its Attorneys

Dated: April 11, 1995

CERTIFICATE OF SERVICE

I, Julian P. Gehman, do hereby certify that a copy of Deutsche Telekom AG's Comments dated April 11, 1995, has been sent by United States mail, postage prepaid, to the parties listed on the attached service list, except where otherwise indicated.

Julian P. Gehman

Julian P. Gehman

Dated: April 11, 1995

*Chairman, Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner, James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner, Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner, Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner, Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Scott Blake Harris
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Washignton D.C. 20554

John R. Hoffman
Sprint Corporation
8140 Ward Parkway
Kansas City, Missouri 64116

Carl Willner, Esquire
Antitrust Division
Department of Justice
555 4th Street, N.W.
Washington D.C. 20001

Anne Bingaman, Esquire
Assistant Attorney General
U.S. Department of Justice
10th St., & Constitution Ave., N.W.
Room 3109
Washington, D.C. 20530

Richard Beaird
Bureau of International Communications and Information Policy
Department of State
2201 C Street, N.W., 4th Floor
Washington, D.C. 20520-1428

Larry Irving
Assistant Secretary for Communications and Information
NTIA Department of Commerce
14th St & Constitution, NW
Washington, D.C. 20230

Jeffrey P. Cunard
Debevoise & Plimpton
555 13th Street, N.W.
Washington, D.C. 20004

*Leon M. Kestenbaum
Michael B. Fingerhut
Sprint Corporation
1850 M Street, N.W.
11th Floor
Washington, D.C. 20036

Don Abelson
Assistant U.S. Trade U.S. Representative for Services, Investment and Intellectual Property
600 17th Street, N.W., #301
Washington, D.C. 20506

Vonya B. McCann
Ambassador
Department of State
4th Floor/CIP
2201 C Street, N.W.
Washington, D.C.

Thomas Sugrue
Deputy Assistant Secretary for Communications and Information
NTIA
Department of Commerce
14th St. & Constitution, NW
Room 4898
Washington, D.C. 20230

Mickey Kantor
U.S. Trade Representative
600 17th Street, N.W.
Room 101
Washington, D.C. 20506

*Delivered By-Hand